IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO (WCA) No.474 of 2003.

Reserved on: 19.06.2007.

Decided on: *July 13, 2007*

Nomi Devi & Ors. ***.....Appellants.***

VERSUS

Sohan Singh & Anr. ***.....Respondents.***

Coram

The Hon'ble Mr.Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No

For the Appellants:	**Mr.Anil Chauhan, Advocate.**
For Respondents:	**Mr.G.S.Rathore, Advocate for respondent No.1.**
	Mr.B. M. Chauhan, Advocate for respondent No.2.

Kuldip Singh, Judge

The claimants / petitioners are in appeal against order dated 31.12.2001 passed by Commissioner Workmen's Compensation, Paonta Sahib, District Sirmaur in case No.6/2001 for enhancement of compensation. The parties are referred herein in the same manner as in the impugned order.

2. The facts, in brief, are that Sher Singh, aged 38 years, was employed as driver by respondent No.1 on truck No.HP-17-9538 on Rs.5000/- per month salary and Rs.100/- daily allowance. On 7.1.2001 he was asked by respondent No.1 to transport limestone in

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment ? Yes***

the truck from *Chhitli (Kamraoo)* to *Sataun* and after unloading the limestone, he was coming from *Sataun to Chhitli* on the same day. At place *Hauna* the truck met with an accident and rolled down in a *Nallah.* Sher Singh sustained multiple injuries and died on the spot. F.I.R. No.18/2001 was registered on 8.1.2001 under Sections 279, 337, 304-A IPC. The accident took place during the course of employment. The claimants / petitioners being the widow, children and mother filed petition under the Workmen's Compensation Act, 1923 (for short 'the Act') and claimed Rs.6 lacs compensation. The respondent No.2 is the insurer of the truck.

3. The respondent No.1 contested the petition by filing reply, he has taken preliminary objection that he is not liable to pay any compensation as the vehicle was insured with respondent No.2 and immediately after the accident respondent No.2 was informed. On merits, he has admitted the employment of deceased as driver with him. It has been denied that the deceased was being paid Rs.5000/- salary per month and Rs.100/- daily allowance. It has been submitted that the deceased was being paid total Rs.2000/- salary per month. The accident and the ownership of the truck has not been denied. It has been submitted that accident took place due to mechanical failure. The liability, if any, is of respondent No.2 to pay the compensation.

4. The respondent No.2 filed the reply and has submitted that the salary of the deceased was not more than Rs.1500/- per month. The accident was caused by the deceased himself. The

deceased was over 40 years. The petitioners are not entitled to compensation. In any case, compensation as per Act is only payable.

5. The Commissioner held that the salary of the deceased was Rs.2000/- per month, he was 38 years of age and an award of Rs.1,89,560/- along with interest at the rate of 9% per annum w.e.f. 7.1.2001 to 31.12.2001 was passed on 31.12.2001 in favour of claimants / petitioners. The petitioners are aggrieved against the award, hence, they have filed the present appeal for enhancement. The appeal has been admitted on the following substantial questions of law:-

(i) Whether the learned Commissioner has erred in law in not granting penalty in terms of Section 4-A of the Workmen's Compensation Act in the facts and circumstances of the case?

(ii) Whether the learned Court below has arrived at a conclusion awarding a less compensation ignoring the pleadings and the evidence on record?

6. I have heard the learned counsel for the parties and have also gone through the record.

SUBSTANTIAL QUESTIONS OF LAWS NO.(i) and (ii):

7. The substantial questions of law No.(i) and (ii) are interconnected and, therefore, are taken up together. The learned counsel appearing for the claimants / petitioners / appellants has submitted that the deceased was being paid Rs.5000/- salary per

month plus Rs.100/- daily allowance as driver by respondent No.1. The Commissioner has wrongly taken salary of deceased Rs.2000/- per month. He has submitted that PW-1 Nomi Devi nowhere admitted in her cross examination that deceased was being paid Rs.1500/- per month salary. He has urged that in fact she has denied the suggestion. The fact remains that there is no corroborative evidence on record regarding the salary which was being paid to deceased Sher Singh by respondent No.1 as claimed by claimants / petitioners. The respondent No.1 in his reply has specifically stated that deceased was being paid total salary of Rs.2000/- per month, nothing has been placed on record by claimants / petitioners to disbelieve the stand of owner of truck that driver was being paid Rs.2000/- per month salary. It is not believable that in the year 2000 a truck driver was being paid Rs.5000/- per month salary in addition to Rs.100/- daily allowance. The Commissioner, after due appreciation of material on record, has rightly come to the conclusion that the deceased was being paid Rs.2000/- per month salary and compensation was awarded to the claimants by taking the salary of the deceased Rs.2000/- per month. The claimants have not disputed the calculation made by the Commissioner by taking the salary of the deceased Rs.2000/- per month and age 38 years. The finding recorded by the Commissioner that the deceased was being paid Rs.2000/- per month salary and claimants are entitled to Rs.1,89,560/- compensation with interest at the rate of 9% from 7.1.2001 to 31.12.2001 requires no interference.

8. The Commissioner has not awarded any penalty to the claimants. The respondent No.1 did not pay the compensation to the claimants when it fell due on account of death of Sher Singh. The employer is liable to pay penalty under sub-section (3) of Section 4-A in case he makes default in paying compensation under the Act within one month from the date it fell due, clause (b) of sub-section (3) of Section 4-A further authorizes the Commissioner to impose penalty not exceeding fifty per cent in case employer fails to justify the payment of compensation. Sub clause (b) of sub-section (3) of section 4-A is reproduced hereinbelow:-

> "(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty.
>
> Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed."

9. The compensation was not paid by respondent No.1 to the claimants when it fell due. He has also failed to justify non payment of compensation to the claimants when it fell due. The liability to pay penalty is of the employer as held by Surpreme Court in ***Ved Prakash Garg Versus Premi Devi & Others [(1997) 8 SCC 1].***

10. Therefore, now the question is how much penalty is to be imposed in the present case. No doubt, the employer has failed to pay compensation when it fell due but it is also the case of the employer in his reply that immediately after the accident he informed insurer but insurer also did not pay the due compensation to the claimants in time. The responsibility to pay the compensation initially is of the employer and insurer is to only indemnify the employer. But taking into consideration that respondent No.1 informed the insurer for payment of the compensation, therefore, in the facts and circumstances of the case, in my opinion, 25% penalty on the compensation amount Rs.1,89,560/- which comes to Rs.47,390/- is sufficient to meet the ends of justice. Accordingly, Rs.47,390/- is awarded on account of penalty to claimants / petitioners which shall be payable by respondent No.1 to the claimants / petitioners. The respondent No.1 shall pay the penalty of Rs.47,390/- to the claimants within two months from today failing which respondent No.1 shall be liable to pay 9% interest on Rs.47,390/- from the date of filing of the petition i.e. 20.2.2001 till deposit / payment.

11. The result of above discussion is that the impugned order is modified. An award of Rs.1,89,560/-, including Rs.50,000/- already deposited by the insurer with the Commissioner with interest at the rate of 9% per annum from 7.1.2001 onwards is passed in favour of the claimants / petitioners and against respondents No.1 and 2

jointly and severally. The truck No.HP-17-9538 was insured with respondent No.2, therefore, respondent No.2 shall pay balance unpaid / deposited amount out of Rs.1,89,560/- along with 9% interest per annum to the claimants / petitioners. The respondent No.1 shall also pay Rs.47,390/- as penalty to the claimants / petitioners within two months from today failing which claimants / petitioners shall be entitled to 9% interest per annum on Rs.47,390/- from respondent No.1 from the date of filing the claim petition i.e. 20.2.2001 till deposit / payment. No costs.

(Kuldip Singh)
Judge.

July 13, 2007
(soni)